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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MAXIMILIANO GARCIA RODRIGUEZ, Defendant and Appellant.	F065712 (Super. Ct. No. F10903458) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Levy, Acting P.J., Kane, J., and Poochigian, J.

Pursuant to a plea agreement, appellant, Maximiliano Garcia Rodriguez, pleaded no contest to 19 felony counts and admitted 22 firearm-related enhancement allegations. All the offenses and enhancements arose out of a series of home invasion robberies. Consistent with the plea agreement, the court imposed a prison term of 26 years. In addition, the court made various monetary orders, including that appellant pay a fee, pursuant to Penal Code section 1203.1b,[1] of $296, for the cost of the preparation of the probation officer's presentence report.

On appeal, appellant's sole contention is that the evidence was insufficient to establish he had the ability to pay the probation report fee and therefore the order that he pay that fee must be stricken. The People counter that appellant forfeited this contention by failing to raise it at sentencing. Appellant acknowledges he failed to raise his claim below but argues that he may nonetheless do so on appeal. We conclude appellant's contention is forfeited, and affirm.

DISCUSSION

"[S]ection 1203.1b specifically authorizes the recoupment of certain costs incurred for ... the preparation of ... presentence investigations and reports on the defendant's amenability to probation.... [T]he section requires determinations of amount and ability to pay, first by the probation officer, and, unless the defendant makes 'a knowing and intelligent waiver' after notice of the right from the probation officer, a separate evidentiary hearing and determination of those questions by the court." (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1070, fn. omitted (*Valtakis*).)

Appellant contends (1) the evidence was insufficient to support the conclusion that he had the ability to pay the probation report fee, and therefore the fee must be stricken, and (2) he has not forfeited this claim by failing to raise it below. He bases the latter

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1 All statutory references are to the Penal Code.

contention on the principle that "Claims regarding the sufficiency of the evidence are never forfeited for a failure to object, even in the context of the sufficiency of the evidence to pay a fee." In support of this contention he cites *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*), *People v. Viray* (2005) 134 Cal.App.4th 1186 (*Viray*) and *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*).

In *Pacheco*, the appellate court struck a probation investigation fee where there was "no evidence in the record that anyone ... made a determination of [the defendant's] ability to pay the $64 per month ... fee" and where "the statutory procedure provided at section 1203.1b for a determination of [the defendant's] ability to pay probation related costs was not followed." (*Pacheco*, *supra*, 187 Cal.App.4th at p. 1401.) The *Pacheco* court held the defendant's challenge to the probation investigation fee was not forfeited because it was "based on the insufficiency of the evidence[,]" which "do[es] not require assertion in the court below to be preserved on appeal." (*Id*. at p. 1397.)

The California Supreme Court disapproved *Pacheco* in the recent case of *People v. McCullough* (2013) 56 Cal.4th 589, 599 (*McCullough*).[2] In *McCullough* the defendant argued that the evidence did not establish he had the ability to pay a $270.17 jail booking fee. (*Id.* at pp. 590-591.) Our high court agreed that under the statute in question appellant had the right to a determination of ability to pay (*id*. at pp. 592-593), but held the defendant forfeited his challenge to the sufficiency of the evidence to support the fee because he did not object at sentencing when the court imposed it (*id.* at p. 591).

The supreme court rejected the defendant's argument that "his challenge [came] within the general rule that '"a judgment ... not supported by substantial evidence"' may be challenged for the first time on appeal ...." (*McCullough*, *supra*, 56 Cal.4th at p. 593.)

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[2] We invited, and both parties submitted, supplemental briefing on the applicability of *McCullough* to the issues raised here.

The court noted it had "appli[ed] ... the forfeiture bar to sentencing matters" in *People v. Welch* (1993) 5 Cal.4th 228 (*Welch*), where it "held the defendant forfeited a challenge to the reasonableness of a probation condition because she failed to raise it when sentenced," and in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), where it "held the defendant forfeited a claim that the sentence imposed on him, 'though otherwise permitted by law, [was] imposed in a procedurally or factually flawed manner.'" (*McCullough*, at p. 594.) Citing *Welch* and *Scott*, the court stated: "[W]e hold here that because a court's imposition of a booking fee is confined to factual determinations, a defendant who fails to challenge the sufficiency of the evidence at the proceeding when the fee is imposed may not raise the challenge on appeal." (*McCullough*, at p. 597.)

The same rationale applies here. Appellant presents a claim of insufficiency of the evidence to support the probation report fee, an issue that requires factual determinations. Appellant was aware the court might impose the probation report fee because the probation report recommended the court order him to pay it. Appellant not only failed to object to the probation report fee, he asserted no claim of inability to pay, and made no request for a hearing on his ability to pay any of the fines or fees. His claim of error regarding the imposition of the probation report fee could have been readily corrected or avoided—and more appropriately reviewed on appeal—had appellant interposed a timely objection in the trial court. Under the reasoning of *McCullough*, we conclude appellant forfeited his challenge to the imposition of the probation report fee imposed pursuant to section 1203.1b.[3]

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[3] The *McCullough* court disposed of *Viray* and *Lopez*, the other two cases cited by appellant, in a two-sentence footnote which concluded, "each case merely references the general rule that an appellate challenge to the sufficiency of the evidence 'requires no predicate objection in the trial court.' (*Viray*, [*supra*, 134 Cal.App.4th] at p. 1217; see *Lopez*, [supra, 129 Cal.App.4th] at p. 1537.)" (*McCullough*, *supra*, 56 Cal.4th at pp. 599-600, fn. 2.)

Appellant seeks to distinguish *McCullough*. He asserts that "[t]he *McCullough* court ... distinguished the booking fee statutes at issue [from] other fee statutes, including ... section 1203.1b" on the basis that section 1203.1b and the "other fee statutes" referenced contain "procedural safeguards and notice requirements"—which in the case of section 1203.1b includes the requirement that the probation officer inform the defendant of his right to a hearing and a determination of his ability to pay—whereas the booking fee statutes at issue in *McCullough* do not contain such safeguards.[4] Appellant asserts, correctly, that nothing in the record suggests "the court or the probation officer complied with the procedural safeguards" of section 1203.1b. Under appellant's reading of *McCullough*, where a defendant fails to raise a claim under a statutory scheme which, like that at issue in *McCullough*, provides no procedural safeguards, that claim is forfeited on appeal, whereas a defendant who, like appellant, fails to raise a claim under a statute like section 1203.1b, but is not afforded the procedural protections mandated by the statute, is not precluded from raising his claim on appeal. We disagree.

Appellant bases his argument on the portion of the *McCullough* opinion in which the court lists several statutes "where the Legislature has similarly required a court to determine if a defendant is able to pay a fee before the court may impose it ...." (*McCullough*, *supra*, 56 Cal.4th at p. 598.) After noting, "In contrast to the booking fee

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[4] Section 1203.1b mandates the following procedures: "The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing, that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver." (§ 1203.1b, subd. (a).)

statutes, many of these other statutes provide procedural requirements or guidelines for the ability-to-pay determination" (*ibid*.), the court explained: "We note these statutes because they indicate that the Legislature considers the financial burden of the booking fee to be de minimis and has interposed no procedural safeguards or guidelines for its imposition. In this context, the rationale for forfeiture is particularly strong" (*id*. at p. 599).

However, as demonstrated above, the court in *McCullough* found the defendant's claim forfeited "*because* a court's imposition of a booking fee is *confined to factual determinations*." (*McCullough*, *supra*, 56 Cal.4th at p. 597, italics added.) The discussion in *McCullough* summarized above provides additional support for, but is not essential to, the court's holding. The *McCullough* court's holding that the defendant's claim was forfeited was based on the nature of the claim, i.e., the fact that it required factual determinations. This rationale applies regardless of whether the statute in question does or does not provide procedural safeguards.

Our conclusion on this point finds support in *Valtakis*, *supra*, 105 Cal.App.4th 1066. In that case, the defendant argued that the trial court erred in imposing a $250 fee because the court and probation officer did not follow the procedures articulated in section 1203.1b, including the provision of notice of the right to a court determination of his ability to pay. (*Valtakis*, at pp. 1070-1071.) Citing this notice provision and the statutory language that "[t]he defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver" (§ 1203.1b, subd. (a)), the defendant argued, "Without notice ... one cannot intelligently waive the right and therefore must be able to assert it for the first time on appeal" (*Valtakis*, at p. 1073).

The *Valtakis* court rejected this argument, relying in large part on *Welch* and *Scott*, and holding that a defendant may not "stand silent as the court imposes a fee—even a

nominal one like the $250 here—and then complain for the first time on appeal that some aspect of the statutory procedure was not followed." (*Valtakis, supra,* 105 Cal.App.4th at p. 1075.) The court stated that the language of section 1203.1b upon which the defendant relied could not be construed as "abrogating *Welch* and *Scott* ...." (*Valtakis,* at p. 1075.) Here too, as in *Valtakis*, appellant's failure to object to the section 1203.1b fee renders his claim noncognizable on appeal, notwithstanding the failure to comply with the procedural requirements of section 1203.1b.

Appellant argues *Valtakis* was wrongly decided. The "grave deficiency" of that case, appellant asserts, is its reliance on *Welch* and *Scott*. Those cases, he argues, deal with failures to raise *sentencing* errors, whereas the imposition of a fee is not "a 'sentence' within the meaning of ... *Scott* ...." We disagree. The probation report fee in the instant case was imposed at sentencing. As the court in *McCullough* made clear with its reliance on *Welch* and *Scott*, the imposition of a fee at sentencing is a "sentencing matter[]" to which forfeiture rules apply. (*McCullough, supra,* 56 Cal.4th at p. 594.)

For the foregoing reasons, we conclude that as a result of appellant's failure to challenge the imposition of the probation report fee at sentencing, he is precluded from doing so on appeal.

DISPOSITION

The judgment is affirmed.